

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM LOUIS BRUNEAU,

Defendant-Appellant.

UNPUBLISHED

January 15, 2008

No. 273957

Wayne Circuit Court

LC No. 06-005719-01

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his bench-trial convictions for operating a motor vehicle while intoxicated, MCL 257.625, and driving in violation of a restricted license, MCL 257.312(4). Defendant's conviction for driving while intoxicated was his third such offense, and therefore a felony under MCL 257.625(9)(c). Defendant was sentenced to 30 days in jail plus 18 months of probation. We affirm. We decide this appeal without oral argument under MCR 7.214(E).

I. FACTS

Officer Caroline Czelada observed defendant driving 15 miles per hour over the speed limit, and not entirely within his own lane. Czelada pulled defendant over. He admitted that he was driving in violation of a restricted license. He exhibited signs of intoxication. Czelada performed a series of sobriety tests, all of which defendant failed. She administered a preliminary breath test and arrested defendant. After a 15-minute observation at the police station, she administered a Breathalyzer test, which defendant failed.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues on appeal that the evidence was insufficient to convict him of operating a motor vehicle while intoxicated. We disagree.

A. Standard of Review

This Court reviews claims of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440

Mich 508, 513-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Further, “conflicts in the evidence must be resolved in favor of the prosecution.” *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). The trier of fact is charged with the responsibility of making credibility determinations and resolving inconsistent evidence. *Id.* at 561.

B. Analysis

The elements of operating a motor vehicle while intoxicated are: (1) operating a motor vehicle, (2) on a highway or other place open to the general public, (3) while under the influence of liquor or a controlled substance, or a combination of the two, or with a blood alcohol content of .08 grams or more. MCL 257.625(1). Under the influence means that defendant “was substantially deprived of normal control or clarity of mind.” *People v Raisanen*, 114 Mich App 840, 844; 319 NW2d 693 (1982).

Defendant only challenges the sufficiency of the evidence with respect to the element of intoxication. He argues primarily that the Breathalyzer test results admitted into evidence were unreliable. The test results showed a blood alcohol level of .16. Defendant refused to take a second test. Defendant argues that this test should not be trusted because he was suffering from acid reflux in the 15 minutes immediately preceding the administration of the test. Czelada observed defendant during this 15-minute period and did not see any signs of distress or regurgitation. Further, defendant did not bring his distress to Czelada’s attention, despite earlier complaining of a sprained ankle when given field sobriety tests. Finally, the lower court doubted defendant’s credibility and noted that Czelada was believable and professional in her testimony. This Court must defer to credibility determinations made by the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Defendant also argues that the variance between the results of the preliminary breath test given at the scene of the traffic stop (.28) and the Data Master Breathalyzer results should call into doubt the accuracy of the Breathalyzer results. Both results are well above the statutory limit. The tests were done on different equipment. Only the Data Master test results were introduced as evidence at trial, along with an exposition of the maintenance and administration procedures with respect to the machine. Defendant stipulated to the working condition of the machine. Given these circumstances, and the credited testimony of Czelada, a rational trier of fact could have found the Breathalyzer results to be an accurate measure of defendant’s intoxication.

Further, there is sufficient evidence that defendant “was substantially deprived of normal control or clarity of mind,” aside from his blood alcohol content. *Raisanen, supra* at 844. Defendant testified that he suffers from posttraumatic stress disorder that causes him to speak slowly and deliberately. He also told Czelada at the time of the traffic stop that he was suffering from a sprained ankle. Czelada observed defendant’s attempts to perform five different sobriety tests, two of which had nothing to do with defendant’s powers of speech or balance. Defendant’s eyes were red and bloodshot. He slurred his speech in addition to speaking deliberately. She observed him driving over the speed limit and not entirely within his own lane. Based on these observations and her experience, she judged him to be intoxicated. The lower court again credited this testimony. A rational trier of fact could find that defendant was intoxicated.

III. DEFENDANT’S ADDITIONAL ARGUMENTS

Defendant makes three additional arguments that are not properly before this Court. “An issue not contained in the statement of questions presented is waived on appeal.” *English v Blue Cross*, 263 Mich App 449, 459; 688 NW2d 523 (2004). We discuss these issues only briefly.

First, defendant argues that the prosecutor did not provide an adequate foundation for the admission of the Data Master Breathalyzer test results. Defense counsel, in fact, stipulated to the qualifications of the operator as well as the maintenance and operation of the Data Master machine. Counsel also stipulated to the admission of the results into evidence. “One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.” *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), quoting *US v Griffin*, 84 F3d 912, 924 (CA 7, 1996).

Defendant next claims that Czelada did not testify whether she advised him of his chemical test rights. In fact, she twice testified that she did read him these rights. Defendant made no objection nor did he cross-examine Czelada with regard to this issue.

Finally, defendant argues that the prosecution failed to prove his prior convictions at trial, as elements of the felony third-offense driving while intoxicated. Defendant relies on faulty authority for this proposition. This Court has established that the sentence enhancement provisions of this statute do not create substantive elements of the offense and need not be proved beyond a reasonable doubt. *People v Weatherholt*, 214 Mich App 507, 511-12; 543 NW2d 34 (1995).

We hold that there was sufficient evidence to find defendant guilty of operating a motor vehicle while intoxicated.

Affirmed.

/s/ Bill Schuette
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher